Office of Chief Counsel Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-2560-99

CMBaerga

date:

to: District Director, Manhattan

ATTN: Mel Birnbaum, Team Coordinator

from: District Counsel, Manhattan

subject:

EIN:

Taxable Years: December 31, December 31, December 31, and December 31, December 31,

Uniform Issue List # 6501.08-00; 6501.08-17

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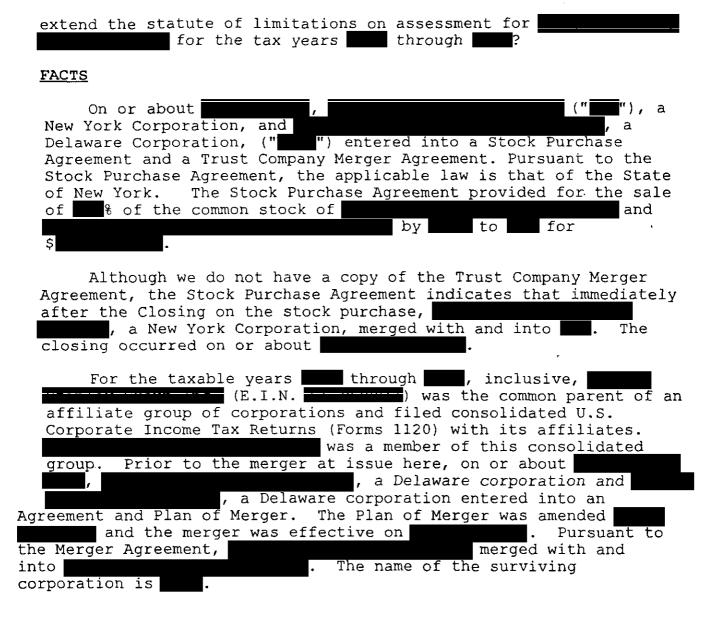
This memorandum is in response to your request for advice concerning the proper entity to execute consents to extend the statute of limitations on assessment for the above-referenced taxpayer for the taxable years through and the proper language to be used in the consents.

The earliest statute of limitations on assessment is currently set to expire on .

<u>ISSUES</u>

- 1. What is the proper entity to enter into consents to extend the statute of limitation on assessment for the taxpayer,

 for pre-merger tax years with respect to Form 1042 Withholding tax under I.R.C. sections 1441 through 1464 for the taxable years through ?
 - 2. What specific language should be used on the consents to



DISCUSSION

1. In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. section 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment of any tax except estate tax. The Form 872 ("Consent to Extend the Time to Assess Tax") is the form generally used by the Service to extend the statute of limitations on assessment.

was a member of a consolidated group during the years at issue. Under I.R.C. section 1501, consolidated returns may be made only with respect to chapter 1 taxes (income taxes) and not chapter 3 taxes (relating to Form 1042 under I.R.C. sections 1441 through 1464), the taxes at issue here. Form 872, Consent to Extend the Time to Assess Tax is used to extend the statute of limitations for Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons.

Each corporation subject to withholding for U.S. source income of foreign persons must execute its own 1042 and corresponding Form 872 regardless of whether it joins in filing a consolidated income tax return. Therefore, even though was a member of a consolidated group for the years at issue, it would still be treated as a separate member for the purposes of the above withholding taxes.

Although we do not have a copy of the merger agreement and have not been able to obtain one through public sources, the Stock Purchase agreement indicates and has represented, that as a result of the merger ceased to exist as it was merged into and became part of . Without the specifics of the merger, we can only address the applicable law on a general basis. Both and company are New York corporations. Generally, under New York law, in a merger "the existence of one of the corporations is continued without the formation of a new corporation, the others being merged in it; the continuing corporation becomes the successor of the merged corporations subject to the rights and obligations imposed by the statute. Matter of Bergdorf, 149 App. Div. 529, 133 N.Y.S. 1012, affirmed 206 N.Y. 309. Under this scenario the consent to extend the statute of limitations on assessment of withholding taxes would be executed by the surviving corporation,

2. The appropriate language to use in the preparation of the consent to extend the time to assess for for the years through (Form 872) is:

(E.I.N.), as successor in interest to, by way of merger with (E.I.N.)".

has provided a copy of signing authority resolution with an attached designation of tax signatories that was executed in signature signing authority resolution is still in effect. Otherwise, an appropriate officer of may execute the consent pursuant to I.R.C. § 6062.

Should you have any questions regarding this matter, please contact the undersigned at (212) 264-5473 ext. 292.

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